

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

GARY DeMASTRY,

Petitioner,

CASE NO. 2:05-cv-267

JUDGE FROST

MAGISTRATE JUDGE ABEL

v.

**WARDEN, HOCKING CORRECTIONAL
FACILITY,**

Respondent.

OPINION AND ORDER

On June 24, 2005, the Magistrate Judge issued a *Report and Recommendation* recommending that petitioner's unopposed request for a stay of proceedings pending exhaustion of claims five and nine be granted, and that petitioner's request for bail be denied. On July 5, 2005, petitioner filed objections to the Magistrate Judge's *Report and Recommendation*. Petitioner objects to the Magistrate Judge's recommendation that he be denied bail pending completion of these habeas corpus proceedings. Additionally, petitioner objects to the Magistrate Judge's recommendation that claims five and nine be dismissed pending his exhaustion of such claims.

As noted by the Magistrate Judge, *see Report and Recommendation* at 6, n.4, although it does not appear that dismissal of petitioner's unexhausted claims pending a stay is mandated under the United States Supreme Court's decision in *Rhines v. Weber*, – U.S. –, 125 S.Ct. 1528 (2005), in *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002), the Sixth Circuit stated that, under such circumstances, “[a] district court should dismiss only the unexhausted claims in the habeas petition and stay further proceedings on the remaining portion until the petitioner has exhausted his/her

remedies in state court.” *Id.*, citing *Zarvela v. Artuz*, 254 F.3d 374, 380 (2nd Cir. 2001). Upon completion of state court action, petitioner may simply request that proceedings be reactivated, and that the petition be amended to again include the previously unexhausted claims.

Pursuant to 28 U.S.C. 636(b)(1), this Court has conducted a *de novo* review of those portions of the *Report and Recommendation* objected to by petitioner. For the reasons discussed at length in the *Report and Recommendation*, petitioner’s objections are **OVERRULED**.

The *Report and Recommendation* is hereby **ADOPTED AND AFFIRMED**. Petitioner’s unopposed request for a stay of proceedings pending exhaustion of claims five and nine is **GRANTED**, and such claims therefore are hereby deleted from the petition pending exhaustion. Petitioner is **ORDERED** to advise the Court every thirty days of the status of state court proceedings. He also must advise the Court within thirty days of completion of state court action. Failure to comply with the foregoing may result in dismissal of this action.

Petitioner’s request for release on bail pending completion of these habeas corpus proceedings is **DENIED**.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
United States District Judge